Attorney General of Hong Kong v Lorrain Esme Osman & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1-24-58 OF 1991
ABU MANSOR J
11 JULY 1994

Banking *— Banking regulations — Secrecy — Bank ordered to give evidence under Bankers' Books (Evidence) Act 1949 — Whether bank or its officers would be in breach of obligation of secrecy — Whether entitled to protection if evidence were given in Hong Kong — Bankers' Books (Evidence) Act 1949 s 6 — Banking and Financial Institutions Act 1989 ss 97(2) & 100*

The applicants, two officers of Bank Bumiputra Malaysia Bhd ('the bank'), applied for, inter alia, an order to determine whether they or the bank would be in breach of the obligation of confidentiality imposed upon them by s 97(1) of the Banking and Financial Institutions Act 1989 ('the BAFIA') if they were to give evidence at the trial of the third defendant, George Tan, in Hong Kong, pursuant to an earlier order made by the High Court under s 6 of the Bankers' Books (Evidence) Act 1949 ('the BBEA').

Held, finding that the applicants would be in breach of the BAFIA if they gave evidence in Hong Kong:

The protection given by s 6 of the BBEA and ss 97(2) and 100 of the BAFIA would only be available to the applicants if they gave evidence in the High Court in Malaysia in compliance with the court order under s 6 of the BBEA. They would not have the protection of the court if they gave evidence in Hong Kong for the order could only operate within the territorial limits of the court's jurisdiction and was not extra-territorial.

[Bahasa Malaysia summary

Pemohon, dua orang pegawai Bank Bumiputra Malaysia Bhd ('bank itu'), telah memohon, antara lain, untuk mendapatkan suatu perintah supaya memutuskan sama ada mereka ataupun bank itu akan melanggar obligasi kerahsiaan yang dikenakan ke atas mereka oleh s 97(1) Akta Bank dan Institusi-Institusi Kewangan 1989 ('ABIK') jika mereka memberi keterangan pada perbicaraan defendan ketiga, George Tan, di Hong Kong, mengikut suatu perintah terdahulu yang telah dibuat oleh Mahkamah Tinggi di bawah s 6 Akta Buku Banker (Keterangan) 1949 ('ABBK').

Diputuskan, mendapati bahawa pemohon itu akan melanggar ABIK jika mereka memberi keterangan di Hong Kong:

Perlindungan yang diberikan oleh s 6 ABBK dan ss 97(2) dan 100 ABIK hanya boleh berkesan untuk melindungi pemohon jika mereka

memberikan keterangan di Mahkamah Tinggi di Malaysia mengikut perintah mahkamah di bawah s 6 ABBK. Mereka tidak akan mempunyai perlindungan mahkamah jika mereka memberikan keterangan di Hong Kong kerana perintah itu hanya boleh beroperasi di dalam had wilayah bidang kuasa mahkamah dan bukanlah suatu perintah luar wilayah.]

[*Editorial Note*: The respondents have appealed to the Court of Appeal vide Civil Appeal No W–02–03–94.]

Cases referred to

A-G v Guardian Newspapers Ltd & Ors (No 2) and related appeals [1988] 3 All ER 545 (refd)

State of Norway's Application (Nos 1 & 2), Re [1990] 1 AC 723; [1989] 1 All ER 745; [1989] 2 WLR 458 (folld)

Westinghouse Electric Corp Uranium Contract Litigation MDL Docket No 235 (Nos 1 & 2), Re [1978] AC 547; [1978] 1 All ER 454 (folld)

Legislation referred to

Bankers' Books (Evidence) Act 1949 s 6

Banking and Financial Institutions Act 1989 s 97(1)

Rules of the High Court 1980 O 66

S Suhendran (*Saheran & Woon*) for the applicants.

Graham Campbell Grant (*Ira Biswas* with him) (*Chooi & Co*) for the first respondent.

Sir Michael Ogden (*BE Teh* with him) (*Teh & Associates*) for the second respondent.

Abu Mansor J: The applicants herein are applicant witnesses: (1) Zauyah Wan Chik; and (2) Lai Ming Kong, who are officers of Bank Bumiputra Malaysia Bhd. In the applicants' application dated 6 May 1994, encl (7), they applied for orders as follows:

(1) As to giving evidence in Hong Kong:

(a) whether the disclosure by the officers of any document or information falling within the prohibition as set out in s 97(1) of the Banking and Financial Institutions Act 1989 ('BAFIA') during the course of giving evidence at the trial of the third defendant in Hong Kong, will constitute an offence under BAFIA or will cause the bank and/or the officers to breach any other obligation of confidentiality imposed upon the officers or the bank under common law;

(b) whether the order made by this honourable court pursuant to the Banker's Books (Evidence) Act 1949 ('the BBEA') dated 4 March 1992, will exempt the officers and/or the bank from committing an offence under s 97(1) of BAFIA or from breaching any other obligation of confidentiality in event of the disclosure of information or documents in the circumstances described in 1(a) above; and

(c) if the answer to 1(b) above is in the affirmative, whether the protection afforded by the order of this honourable court pursuant to the BBEA dated 4 March 1992 will only exempt the bank or the officers from breaching their obligation of confidentiality under s 97(1) of BAFIA or under common law, with respect to the disclosure of information or documents relating to the areas set out in the said order only. A

(2) As to the taking of evidence in Malaysia: B

(a) whether the evidence of the officers to be recorded by this honourable court in these proceedings pursuant to the letter of request issued by the Hong Kong Supreme Court ('the letter of request'), the orders of this honourable court dated 25 September 1991 and 4 March 1992, by way of examination-in-chief, cross-examination or otherwise, is to be limited or confined to the areas set out in the letter of request and/or the said orders only; and C

(b) whether the protection afforded by the order of this honourable court made under the BBEA dated 4 March 1992 will only exempt the bank or the officers from breaching their obligations of confidentiality under s 97(1) of BAFIA or under common law, with respect to the disclosure of information or documents relating to the matters set out in the said order only. D

(3) That provision be made for the costs of this application.

As the question that has been framed by the applicant is so wide and difficult for me to answer, I requested if parties could somehow resolve the issues and the applicant and the parties have so resolved and on 10 May 1994 they came up as follows: E

(a) We are all agreed that in the absence of an order made under s 6 of the Banker's Books (Evidence) Act 1949 ('BBEA'), it is an offence under s 97(1) of the Banking and Financial Institutions Act 1989 and a breach of the duties of confidentiality under common law for the applicant witnesses to give evidence in Hong Kong or in Malaysia. F

(b) Subject to paras (i) and (ii) below which define the issues between the parties, we are all agreed that once an order is made under s 6 of the BBEA, the provisions of s 97(1) and the duties of confidentiality under common law do not apply: G

(i) whether an order made by this court pursuant to the BBEA exempts the applicant witnesses from committing any offence under s 97(1) or breaching their duties of confidentiality when giving evidence in Hong Kong; and

(ii) if applicant witnesses give their evidence in Malaysia is their evidence to be restricted solely to what is contained in the letters of request, the orders made under O 66 or the order made pursuant to s 6 of the BBEA. H

After hearing some lengthy argument by Mr Suhendran who appeared for the applicants and the bank, I raised the question that if the question as resolved is answered by the court and then the two witnesses finally decide that they are not willing to go and give evidence in Hong Kong, the court's order would be an exercise in futility as the witnesses are not compellable. The court therefore insisted that they be present in court to be personally I

A questioned and to give their answers as to their stand as to the giving of the evidence in Hong Kong.

The two witnesses kindly appeared without any difficulty on 11 May 1994 and they told the court if they are wanted to give evidence in Hong Kong and their bank wants them to do so, they would willingly do so as B requested though they understand and are aware that they could not be compelled to do so by the court in Hong Kong and that the only impediment to their doing so in Hong Kong was whether they would be committing an offence if they did so and would they be able to get the court's protection having done so? I was then satisfied that this court's order would not be futile if we were to proceed to hear the further argument. However, C Mr Suhendran's path was further thwarted by a matter posed by the court.

In question (b)(ii) that had been posed, I asked the parties if the question to be answered may not embrace or fit all circumstances that had yet to arise and the court would be in the position of having to anticipate the circumstances. This court had also previously answered questions D relating to relevancy and materiality of the evidence, in the course of these proceedings and it had decided that such questions were to be the function of the trial judge hearing the case in Hong Kong though this court was obliged to record any objection and could even express its opinion on that evidence.

E On hearing the court's comment on the issue in (b)(ii) and the court's observation that the court would actually deal with the question as it arises rather than anticipate at this stage, Mr Suhendran has kindly agreed only to further proceed with the argument and confine himself to arguing only the question posed in (b)(i) and he was satisfied that he could F raise it when it arises and the court would deal with it specifically.

From here on it was agreed by the parties that the only question needed to be answered by the court was in respect of (b)(i) which, as stated earlier, was whether an order made by this court pursuant to s 6 of the Bankers' Books (Evidence) Act 1949 ('the BBEA') exempts the applicant witnesses from committing any offence under s 97(1) [of the Banking and G Financial Institutions Act 1989] or breaching their duties of confidentiality when giving evidence in Hong Kong.

Section 6 of the BBEA is as follows:

> An officer of a bank shall not, in any legal proceedings to which the bank is H not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special cause.

Mr Suhendran submitted that the exemption given by complying with s 6 of the BBEA would only apply if the witness gives that evidence in I Malaysia. Put in another way he says the exemption will not apply to protect the witnesses when they give evidence in Hong Kong in the proceedings there. Counsel referred the court to the actual order at p 67 of encl (7) dated 4 March 1992. Counsel further submitted that it cannot

be denied that that order relates to the taking of evidence in Malaysia and that the order was also ancillary to an order under O 66 of the Rules of the High Court 1980 — the order of Eusoff Chin J, as he then was. He further elaborated that the order was for exemption in the examination to be conducted by a High Court judge. In short, he said the order under the BBEA was to allow the witnesses the protection of and also under s 100 of the Banking and Financial Institutions Act 1989 ('the BAFIA') from the prohibition under s 97 of this latter Act.

Counsel submitted further that the protection given by the BBEA cannot be availed by these witnesses by voluntarily giving evidence in Hong Kong. If they go to Hong Kong to give the required evidence, they could be committing an offence and breach the common law duty of confidentiality. He submitted that the order once given, the exemption comes into play, but only as regards the giving of evidence in Malaysia.

Mr Suhendran then proceeded to submit a reply in anticipation of Sir Michael Ogden's submission found in paras 8 and 9 of R177 wherein Sir Michael Ogden argued that all the documents and evidence had been read and disclosed in court and therefore, in the public domain and therefore would no longer be secret and the court, therefore, would not prevent their publication.

Mr Suhendran submitted that while the above may be the common law view, there exists a statutory prohibition in the form of s 97 of the BAFIA which reads thus:

> 97 Secrecy
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> (1) No director or officer of any licensed institution, whether during his tenure of office, or during his employment, or thereafter, and no person who for any reason, has by any means access to any record, book, register, correspondence, or other document whatsoever, or material, relating to the affairs or, in particular, the account, of any particular customer of the institution, shall give, produce, divulge, reveal, publish or otherwise disclose, to any person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.
>
> (2) This section shall not apply to any information or document which at the time of the disclosure is, or has already been made, lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.
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> (3) No person who has any information or document which to his knowledge has been disclosed in contravention of subsection (1) shall in any manner howsoever disclose the same to any other person.

And the exemption under s 97(2) can only apply when the source of such information is from other than the licensed institution.

Mr Suhendran's submission was to the effect, I stand corrected, that all the evidence sought to be disclosed, including that already disclosed,

A are all information which had their source from the bank and because the disclosure, was [by] the licensed institution, the bank, the s 97(2) protection would not apply to them and by virtue [of that] the witnesses are still bound to observe the prohibition of s 97(1). Being so bound and even though they have the exemption under s 6 of the BBEA order, that would only cover their evidence here in Malaysia and not their evidence in Hong B Kong. The witnesses' position is further aggravated by the fact the evidence and documents to be given, for example by Zauyah Wan Chik, cannot for sure be said clearly to have been disclosed and read in open court as she had never given evidence before. He further reiterated that even though the documents had been disclosed to investigators such as Clifford Allison, C it does not mean that such information is already in the public domain. The information had been disclosed subject to their undertaking not to disclose them for any purpose other than for the purpose of these proceedings. If evidence is given in Hong Kong by them, for example, no one can be sure if that evidence might not be wider than what would be allowed by the order.

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Mr Suhendran also submitted the difficulty would appear to be the work of determining factually whether such information had already been in the public domain and not disclosed by the bank so as to bring it within the ambit of the protection under s 97(1) of the BAFIA.

E Mr Grant for the Hong Kong Attorney General supports and endorses the argument and submission of Mr Suhendran that the prohibition runs even though the document is with the public and had their source from the bank. Mr Grant kindly took the court to several sections of the BAFIA and how strict its applications are and there are provided also penal provisions in the event of its or their breach but they can only relate to proceedings F in Malaysia.

Mr Grant submitted further that as far as the scope of the orders made under the BBEA is concerned, the position of the Attorney General of Hong Kong is as follows:

> G The Malaysian court does not have the jurisdiction to make the order purporting to have extra-territorial effect because this court will not have sovereignty beyond its frontiers. Just as the witnesses cannot be compelled by the Hong Kong courts to give evidence there likewise this court could not compel them to give evidence in Hong Kong.

While this was the Attorney General of Hong Kong's stand as to the H court's jurisdiction but, if I understand Mr Grant, his submission on this is slightly different. He submitted that not every act can be covered but if a witness were to first give evidence here in Malaysia and the witness then proceeds to Hong Kong and further gives evidence there, that does not constitute an offence under the BBEA provided there is absolute compliance with the court order here, and if the witness gives testimony and produces I documents there, that also does not constitute an offence under the BAFIA. In such circumstances, the giving of the same evidence there in Hong Kong is covered by the BBEA. Other than this, he endorsed and adopted the applicant's view. Mr Grant addressed the court at length

further than s 97 of the BAFIA but as this court is only obliged to answer the question posed, I do not propose to refer to them. A

Then as regards the submission that the documents yet to be produced are already in the public domain on a factual basis, he said they are not documents that are in the public domain in the common law sense. In this regard, only part of 'CHA–1' and 'CHA–2' were read in England during the course of the protracted habeas corpus proceedings, we believe, and document 'CHA-3' were material to the proceedings. He admitted that while Zauyah Wan Chik's 'CHA-2' and 'CHA-3' documents some may have been produced but not all have been so. B

On Sir Michael's part, he submitted that this matter arose because the bank decided to get advice. He relied on the celebrated case of *A-G v Guardian Newspapers Ltd & Ors (No 2) and related appeals* [1988] 3 All ER 545 where it was held that the court would not grant an injunction restraining the publication of confidential information acquired by a Crown servant in the course of his employment by the Crown if it could be shown that publication of the information would not be contrary to the public interest. C D

He submitted that s 6 of the BBEA order once given overrides the provision of BAFIA, in particular, s 100 of the latter Act overrides s 97 of that Act. He posed further the question if after the issue of an order, the witness can give evidence in Hong Kong or the witness is obliged to give evidence in Hong Kong? He answered why not. He submitted that there are good reasons why that evidence is desirable as no court would do anything to diminish the prospect of a fair trial. He said if the jury could not hear the witness, it would work against a fair trial. In this case, the two witnesses had already indicated they are prepared and are willing to go and there is no reason why not. He submitted that if the court accepts his submission then there is no need for the court to consider s 97(2) of the BAFIA. E F

He submitted that the evidence was already available to the public and as to the source, he submitted that if a witness gives such evidence in the witness box pursuant to a court order, in reality, the court is the source in accordance with the direction of the court. The question was whether or not the documents had been so produced, some witness must speak of that document. G

Having considered this application and the arguments of all parties, I say, with respect, I find merit in the argument of Mr Suhendran that the protection given by s 6 of the BBEA and ss 97(2) and 100 of the BAFIA would only be available to the witnesses if they give their evidence in our High Court here in Malaysia in compliance with the court's order under s 6 of the BBEA. I rule they would not have the protection of the court if they voluntarily agree and do give evidence in Hong Kong. I say this, not even in pursuance of and in compliance with a court order here and they were to continue with that evidence in Hong Kong for the order that gives them that protection can only operate within the territorial limits of the court's jurisdiction [and is] not extra-territorial. I base my decision on the H I

A case in *Re State of Norway's Application*. In *Re State of Norway's Application (Nos 1 & 2)* [1990] 1 AC 723; [1989] 1 All ER 745; [1989] 2 WLR 458, where the State of Norway applied to have the evidence of two witnesses, in the jurisdiction of the English court, recorded; the first application of the State of Norway was initially rejected because the request was too wide but when they applied a second time, with detailed questions on specific B matters, that application was granted by the English court. Lord Goff of Chieveley ([1990] 1 AC 723 at p 796; [1989] 1 All ER 745 at p 751; [1989] 2 WLR 458 at p 465) approving *Re Westinghouse Electric Corp Uranium Contract Litigation MDL Docket No 235 (Nos 1 and 2)* [1978] AC 547; [1978] 1 All ER 454, favourably quoted the words of Lord Diplock C ([1978] AC 547 at p 633; [1978] 1 All ER 454 at p 461):

> The jurisdiction of English courts to order persons within (their) jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory ...

Then in *Re State of Norway's Application*, his Lordship said ([1990] 1 AC D 723 at p 800; [1989] 1 All ER 745 at p 755; [1989] 2 WLR at pp 469–470):

> ... the argument advanced on behalf of the witnesses would involve a profound departure from the established legal practice of conferring a very broad jurisdiction upon the courts in the United Kingdom to enable them E to provide assistance for courts in other jurisdictions by obtaining evidence for them.

I would add and emphasize that the purpose of the whole exercise is for the purpose of 'obtaining evidence for them' with all the in-built conditions such as to be found in our s 97(2) of the BAFIA clearly specified by F Parliament when such evidence, if improperly given, can become an offence. The intention of Parliament is, I think, clear. The records or evidence to be divulged are Malaysian. It is plain to me that the task of determining that the BAFIA is not breached can only fall on the shoulders of courts in Malaysia. I would therefore answer Mr Suhendran's poser in (b)(i) in the negative, with each party to bear its own costs.

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Order accordingly.

Reported by Anne Khoo

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